IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 3 OF 1995

Mrs. Pramila P. Visawadia ..Appellant

Vs.

Shri S.G. Pamnani & Anr. ..Respondents

Mr. J.S. Kini for the appellant.
Mr. S.P. Kanuga with Mr. B.T. Shroff for Respondent No.1.
Ms.G.S. Joglekar for Respondent No.2.

CORAM: B.H. MARLAPALLE, J.

Date : June 13, 2005.

P.C.:

1. Being aggrieved by the order dated 7/12/1994 passed by the learned Judge of the City Civil Court at Mumbai in Notice of Motion No.3690 of 1994 filed in S.C. Suit No.4546 of 1994 this appeal from order is filed by the defendant no.2.

2. Admittedly, both the parties are neighbours in the row house flats located in the premises of Rajawadi Co-Operative Housing Society Ltd., Chittaranjan Nagar, Rajawadi, Ghatkopar (East), Mumbai

400 077. The plaintiff occupies flat no.B-13/204 whereas the defendant no.2 occupies flat No.B-15/216 of the said Society which has not been impleaded in the suit. The operative part of the impugned order reads as under :-

> "The defendant no.2 shall remove the water tank presently constructed and construct a water tank of the capacity allowed by defendant No.1, 3 feet away from the wall of the plaintiff's tenement, within one month from today. If defendant no.2 fails to take steps for removal of the water tank, defendant No.1 shall disconnect the water supply as notified to her under letters dated 16/9/1992 and 12/2/1994 and take action for demolition of the water tank by issuing notice u/s 351 within 8 weeks from today....."

3. It appears that after the respective tenements were occupied, the defendant no.2 who is the present appellant constructed a water tank which caused inconvenience to the plaintiff and the water tank was found to be contrary to the approved plans in as much as the permissible water tank capacity would be 300 gallons whereas the subject tank constructed was of 2000 gallons. The plaintiff appears to have pointed this illegality both to the defendant no.1 as well as

Rajawadi Co-Op. Hsg. Society Ltd. As both of them did not take any steps, at the first instance the plaintiff had filed Case No.155 of 1992 before the 5th Cooperative Court at Mumbai and in the said proceeding the learned Judge of the Cooperative Court by his order dated 13/5/1992 had granted injunction in the following words:-

> "The opponent is allowed to construct a water tank and fix the water connection putting the brick wall in the middle of the two water tanks one feet away from the side wall of the Disputant and put the brick wall by cement plastering and water proofing just to avoid leakage and seepage. The Opponent is further directed to put hole at the side of the water tank in one feet space if there is leakage of the water from the brick wall so that water will flow away from that hole. The opponent to put the slopes towards this hole just to have the water flow from that hole. This arrangement is continued till the decision of the B.M.C. as per approved plan regarding overhead tank on the terrace of the opponent's building."

4. On 26/4/1994 the Hydraulic Engineer's Department of the Defendant No.1-Corporation under direction of the Municipal Commissioner informed the

Defendant No.2 that Occupation Certificate in respect of the suit premises would not be issued till a physically separate overhead storage tanks of requisite capacities are provided from the his wall. The Plaintiff challenged the action of the BMC by filing the suit.

5. While issuing notice, this court by order dated 6/1/1995 had ordered status quo to be maintained and, therefore, the impugned order passed by the Court below i.e. City Civil Court at Mumbai could not be implemented by the Defendant No.1- Corporation in case there was a failure on the part of the Defendant No.2 to modify the water tank temporarily.

6. When this appeal was heard on the last date i.e. on 6/6/2005 it was directed to the Engineer concerned of the Defendant No.1-Corporation to visit the suit premises and submit a report regarding the alterations to the tank. The report submitted today by the Executive Engineer of the Defendant No.1 - Corporation states that on his visit to the suit premises on 10/6/2005 he observed that the owner has

already constructed a diphram wall within the water tank but away from the common wall of the defendant no.2. The report dated 10/6/2005 submitted by the Executive Engineer confirms that the owner has constructed a diphram wall within the water tank away from the common wall of the residence of defendant no.2. Thus, the order passed by the Court below has been implemented and the question of demolition may not arise. However, the learned counsel for the defendant no.2 submitted that a portion of the water tank which is kept dry by constructing a wall is required to be demolished so that the remaining water tank is upto the capacity including its height and, therefore, this Appeal from Order could be disposed of by giving such direction so that the pending suit also comes to an end.

7. Mr. Kini the learned counsel for the appellant on the other hand submitted that the order passed by the Co-operative Court as well as the learned Judge of the City Civil Court, Mumbai has been duly implemented and it is for the trial court to decide the suit on merits after considering the

evidence, the parties may lead.

8. Whether the water tank has been constructed as per the sanctioned plan, of the storing capacity of 300 gallons, there are no leakages in the house of the defendant no.2 as at present are the issues which will have to be gone into by leading evidence and this can be done in the pending suit. Doubts were expressed on the visibility of such a course. The report submitted by the Hydraulic Engineer's Department of the Defendant No.1-Corporation shows that the leakages complained by the defendant no.2 shall be abetted by the partition so made and from the same report it appears that as at present the plaintiff do not have an immediate grievance. Whether to direct the construction of a new tank upto the approved capacity or retain the existing tank by modification to meet the same capacity are the issues to be decided by the trial court while deciding the challenge raised by the plaintiff to the orders passed by the BMC. In the instant appeal the order of status quo has operated for the last about 10 years and it would be, therefore, expedient to direct the trial court to

decide the pending suit within a fixed period. The learned counsel for the respective parties have assured this court that plaintiff and defendants would extend full cooperation to the court below in deciding the suit within such a period.

9. Hence, the appeal is disposed off by directing the court below to hear and decide the L.C.Suit No.4546 of 1994 on its own merit and as expeditiously as possible but in any case before 31st December, 2005. The order of status quo granted by this Court earlier shall continue to operate till 31st December, 2005.

. Needless to mention, the suit will be decided without being influenced by any observations made in this order and the report submitted by the BMC official would not come in the way of either of the parties for exercising their rights during the trial. The BMC will not issue occupation certificate to the defendant no.2 till 31st December, 2005.

(B.H. Marlapalle,J.)